FOR ARGUMENT

Supreme Court, U. S.
FILED
MAR 30 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE, *Petitioner,*

v.

FRANCES B. DAVIS, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether the court of appeals held correctly, consistent with Section 504 and the implementing HEW Regulation, that the district court erred in focusing solely on Respondent's handicap to determine whether she was qualified for admission.

2. Whether the court of appeals was correct in suggesting that the district court give close attention on remand to affirmative relief in light of the district court's failure to consider any accommodation for Respondent's handicap.

3. Whether a handicapped individual can maintain a private action in federal court to enforce his/her statutory rights under Section 504.

4. Whether the issues of exhaustion of administrative remedies and primary jurisdiction are properly before this Court when these issues were never raised in the courts below.

STATUTES AND RULES INVOLVED

Section 7 of the Rehabilitation Act of 1973, 29 U.S.C. § 706, as amended:

(6) The term "handicapped individual" means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter. For the purposes of subchapters IV and V of this chapter, such term means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 119, 92 Stat. 2982 (1978) ("the 1978 Amendments").

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded

from the participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

H.E.W. Regulation implementing Section 504 of the 1973 Act, May 4, 1977, 45 C.F.R. Part 84:

§ 84.10 Effect of state or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons.

§ 84.42 Admissions and Recruitment

84.42(b)(4) In administering its admissions policies, a recipient to which this subpart applies:

Except as provided in paragraph (c) of this section, may not make preadmission inquiry as to

whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation.

§ 84.43 Treatment of Students: General

84.43(c)

A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

§ 84.44 Academic adjustments

84.44(a)

Academic requirements. A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

84.44(d)

Auxiliary aids. (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation

in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

STATEMENT OF THE CASE

Frances Davis is an actively employed, duly qualified, licensed practical nurse (LPN). Her license, issued by the State of North Carolina in 1967, is currently in good standing. (App. 109a).

Mrs. Davis, seeking to advance in the nursing profession, applied in March 1973, to Southeastern Community College for admission as a student in the 1973-74 school term. (App. 116a). Mrs. Davis submitted, as part of her application, a Pre-entrance Medical Record, in which the examining doctor evaluated her as ". . . mentally and physically able to undertake the program in professional nursing," and recommended her for admission. (App. 120a).

On August 17, 1973, the College accepted Mrs. Davis for admission in the 1973-74 school year with the understanding that Mrs. Davis planned to advance to the Associate Degree Nursing Program the following school year. The College advised Mrs. Davis that her "progress would be evaluated at the end of this [1973-

74] school year to determine your acceptance into the nursing program." (App. 123a).

Mrs. Davis successfully completed her courses during the 1973-74 school term. Nevertheless, the College advised her, on May 6, 1974, that she did not qualify for acceptance to the Associate Degree Nursing Program. The College refused to accept Mrs. Davis solely because of her hearing impairment. (App. 77a, App. 129a-130a).

As part of the College's evaluation process, Mrs. Davis was interviewed in April of 1973 and again in March 1974. The College then requested that Mrs. Davis submit to an evaluation of her hearing by an audiologist.

The hearing evaluation indicated that Mrs. Davis has a bilateral moderately severe sensori-neural hearing loss. The audiologist determined that the hearing aid worn by Mrs. Davis "provided little if any help for March 1974. The College then required that Mrs. Davis had been fitted with a new hearing aid:

> . . . which provides her significant improvement in her hearing which approaches normal hearing levels. In other words, while she is wearing the hearing aid, she should be able to hear a talker almost as well as a person would who has normal hearing. However, to effectively understand speech of that talker she must use her vision to supplement her hearing. It is my opinion that she is an excellent lip reader and performs well above what one would expect for a person with this degree of hearing impairment.

(App. 127-128a).

Nevertheless, the College scheduled no further interviews with Mrs. Davis with the new hearing aid. Instead, the College advised Mrs. Davis that she did not qualify for acceptance to its nursing program. (App. 129a-130a).

Mrs. Davis then asked the College to review her application. The College requested an opinion from the Executive Director of the North Carolina Board of Nursing who responded, "We concur with your opinion as stated on the telephone, that Mrs. Davis' hearing disability can preclude her being safe for practice in any setting allowed by a license as a[n] RN, *or by license as a[n] LPN.*"* (emphasis added). (App. 132a). But the Executive Director further stated, "We cannot, at this time, predict eligibility or ineligibility for the licensing examination should Mrs. Davis enroll in, and be allowed to complete the program some several years hence." (App. 139a).

The College also asked the Director of Nursing Services at Southeastern General Hospital whether the hospital would employ her as a registered nurse. (App. 142a-143a). Mrs. Davis had worked as an LPN under the Director of Nursing Services at Southeastern General Hospital. (App. 156a). The Director responded:

> I would employ Mrs. Davis in our Skilled Nursing Facility as an RN if I had a vacancy. . . . We have the New Methodist Home that will be built in the near future that will have positions that I feel she can handle. Mrs. Davis could also handle the night assignment on our Post Partum Units without difficulty after she is registered.

(App. 144a-145a).

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* Evidently the Executive Director did not know that Mrs. Davis had in fact functioned as an LPN for many years.

The Director further stated:

> Mrs. Davis and I have discussed her hearing problem. . . . In areas such as long term care, a doctor's office or even industrial, she could do well. I do not believe that I can truthfully state that she would not be able to function in any area of nursing with her present determination to continue her education.

(App. 140a-141a).

Citing the reports of the audiologist, the Executive Director of the State Board of Nursing, and the Director of Nursing Services at Southeastern General Hospital, the College then rejected Mrs. Davis' request for reconsideration of her application. (App. 146a-148a). Thereafter, she brought this suit.

Testimony at the trial revealed that Mrs. Davis was academically qualified for admission into the nursing program and that her application was rejected solely because of her hearing disability. (App. 77a). The testimony also indicated that there are no physical distinctions in qualifications for a Registered Nurse (RN) and a Licensed Practical Nurse under North Carolina statute. (App. 47a). The testimony further revealed that Mrs. Davis, with an instructor supervising her, could have accomplished all skill levels in the clinical program. But the College did not want to modify its program to compensate for Mrs. Davis' hearing difficulty. (App. 53a). Indeed, the College admitted that it had not developed any curriculum to aid any handicapped students. (App. 86a). Despite these admissions, the College maintained that Mrs. Davis, "was not qualified or suitable for the Associate Degree Nursing Program by reason of her disability." (Pet. App. 17a).

The district court held that Mrs. Davis was not "otherwise qualified," and concluded that the College had not violated either Section 504 or 42 U.S.C. § 1983 in refusing to admit Mrs. Davis to its nursing program. (Pet. App. 20a).

On appeal, the Fourth Circuit held unanimously that the district court had erred in its reading of Section 504, particularly in light of the HEW Regulation to Section 504, issued after the district court decision. The Fourth Circuit ordered the district court to reconsider Mrs. Davis' application for admission to the College nursing program without regard to her hearing disability. (Pet. App. 5a). The court noted that "the college may consider such other relevant subjective and objective factors . . . utilized in the consideration of other candidates for enrollment in the nursing program." (Pet. App. 5a). While College nursing personnel had admitted that Mrs. Davis was academically qualified, the appeals court expressed no further opinion concerning Mrs. Davis' scholastic suitability. (Pet. App. 5a).

The court of appeals thus concluded that the district court erred by considering the nature of Mrs. Davis' hearing disability in determining whether she was otherwise qualified for admittance to the nursing program, instead of focusing upon her academic and technical qualifications as required by the HEW Regulation. (Pet. App. 6a). In light of the position of the College that it was not prepared to modify its nursing program to accommodate Mrs. Davis' hearing disability, the appellate court directed the district court, on remand, to give close attention to the HEW Regulation requiring the College to modify its program to accommodate Mrs. Davis' disability. (Pet. App. 9a).

The Fourth Circuit also affirmed the implicit ruling of the district court that a private right of action exists under Section 504. (Pet. App. 3a). However, in a footnote, the appeals court suggested that the district court also consider the issue of administrative exhaustion and primary jurisdiction, matters which had not been raised in either the district court or in argument before the court of appeals. (Pet. App. 11a).

The College petition for rehearing was soundly rejected, with only two judges voting to affirm the judgment of the district court.

SUMMARY OF ARGUMENT

I

Mrs. Frances Davis, a Licensed Practical Nurse with a hearing-impairment, wanted to enroll in a nursing school program at Southeastern Community College to become a Registered Nurse. Mrs. Davis sought to reach her full potential through advanced education, but the College refused her that opportunity solely on the basis of her hearing-impairment, without ever considering any possible accommodation for her disability. The College, on the basis of misconceptions and stereotypes, set up an absolute bar against any hearing-impaired person being admitted to nursing school. The district court's approval of the College's action foreclosed educational advancement for Mrs. Davis, in direct conflict with the purpose of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, to help handicapped people reach their full potential. The court of appeals found that the district court erred in supporting the College's rejection of Mrs. Davis

solely on the basis of her handicap. The court of appeals' reversal was consistent with the statutory language and legislative intent of Section 504 as well as the subsequently enacted Regulation by the Department of Health, Education and Welfare (HEW).

The College's erroneous assumption that a hearing-impaired person cannot safely and effectively complete the educational requirements to become a registered nurse is contradicted by the very existence of many hearing-impaired persons safely and effectively performing in society every day as nurses, dentists and doctors. The College refused to recognize the possibility that Mrs. Davis could safely and effectively participate in its program, as other hearing-impaired persons have done elsewhere. The College insisted that Frances Davis—a woman whose hearing "approaches normal hearing levels," an experienced LPN with the highest recommendation from her employer—was not qualified solely because of her disability. The College's decision was dominated by the "archaic attitudes" that Section 504 and its Regulation sought to overcome.

The court of appeals properly gave deference to the statutorily delegated, carefully developed administrative interpretation of Section 504 in the HEW Regulation. The major thrust of the Regulation is to evaluate handicapped applicants on the basis of their qualifications. Only then can they receive an equal opportunity to participate in federally funded programs without being screened out at the admission stage.

This does not mean that schools must ignore a student's handicap. The Regulation allows colleges to evaluate a qualified student's handicap for purposes of determining what academic adjustments, if any, can be

made to enable the student to participate in the program. Academic adjustments, required by the Regulation, are essential to ensure that handicapped students receive equally effective treatment.

The College, however, was unwilling to make any academic adjustments for Mrs. Davis. Indeed no evidence was ever taken on the issue. Evidence on whether any accommodations were made for Mrs. Davis during her academic and clinical training as an LPN, and evidence on her employment experience at Southeastern General Hospital would help assess possible adjustments in the College's nursing program. Advances in medical technology have enabled many hearing-impaired RNs and doctors to function safely and effectively through the use of auxiliary aids.

Without such evidence, the district court rubberstamped the conclusory assertions regarding the inability of Mrs. Davis to safely and effectively perform in the clinical program. The appeals court properly remanded, suggesting that the district court consider the issue to academic adjustments which enable handicapped people to achieve their full potential. The court of appeals correctly followed the well established approach, approved by this Court, of remanding to the district court for reconsideration of Mrs. Davis' application for admission in light of the Regulation that postdates the district court decision.

II

Case law, legislative history and the statutory scheme of Section 504 confirm that under the four standards set forth by this Court in *Cort* v. *Ash,* 422 U.S. 66 (1975), Frances Davis can maintain a private cause of

action to enforce her statutory rights under Section 504.

First, Section 504 was enacted to prevent discrimination against all handicapped individuals. Frances Davis, a hearing-impaired woman, is thus obviously "one of the class for whose *especial* benefit the statute was enacted." *Cort,* 422 U.S. at 78.

Second, there is an abundance of legislative history indicating Congressional intent to create a private right of action. The 1978 Amendments confirm the Congressional intent expressed as far back as 1974, that "Section 504 . . . permit[s] a judicial remedy through a private action." S.REP.No. 1297, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373, 6390.

Third, enforcement through private litigation is consistent with and promotes the legislative purpose of the statute. In view of the large number of federally funded programs covered by Section 504, "the Act's laudable goals would be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the [federal government]." *Allen* v. *State Bd. of Elections,* 393 U.S. 544, 556. Indeed, HEW itself firmly supports a private right of action for that very reason. Private suits are especially necessary because of the limited scope of administrative relief under Section 504. If the only remedy available were fund termination, then Congress' anti-discrimination mandate would be an "empty promise" for the very persons Congress intended to protect. Cf. *Allen,* 393 U.S. at 557. Private suits not only provide an avenue for vindication of personal rights under Section 504, but also complement the administrative fund

termination procedure by serving as an additional deterrent to violations.

Finally, the prohibition against handicap discrimination in federally funded programs is a uniquely federal concern, not traditionally relegated to state law. Thus, as recognized by every circuit court that has considered the issue, a private right of action to enforce Section 504 must be implied under the standards established in *Cort* v. *Ash*.

Petitioner erroneously contends that the Court must consider the issues of exhaustion of administrative remedies and primary jurisdiction if a private right of action is found. Neither issue was presented in the courts below. The Fourth Circuit thus properly remanded to the district court for consideration of these issues, if it deemed advisable.

Assuming *arguendo* that the exhaustion issue is properly before this Court, that doctrine should not prevent Frances Davis from bringing an independent private cause of action, because the HEW administrative remedy is inadequate and ineffective. HEW's administrative procedures are not designed to vindicate the personal rights protected by Section 504. "In short, while the administrative process may effectively provide, by way of the threat of fund termination, an incentive to comply with Section 504, it provides no means by which an individual can obtain personal redress for a Section 504 violation." *Whitaker* v. *Bd. of Higher Education of City of NY*, 77-C-2258, slip op. at 19-20 (E.D. N.Y. Oct. 17, 1978).

The doctrine of primary jurisdiction also does not apply to the present case because of the same administrative inadequacies that excuse exhaustion. Moreover, courts are highly experienced and well-suited to the tasks of adjudicating discrimination complaints and interpreting the Section 504 Regulation. Thus, there is no need to allow HEW to take primary jurisdiction in this case.

ARGUMENT

Introduction

Mrs. Frances Davis, a Licensed Practical Nurse with a hearing impairment, wanted to enroll in a nursing school program at Southeastern Community College to become a Registered Nurse. Mrs. Davis sought to reach her full potential through advanced education. But the College refused her that opportunity solely on the basis of her hearing impairment, without ever considering any possible accommodation for her disability. The College, on the basis of false stereotypes, created an absolute bar against any hearing-impaired person being admitted to nursing school. The College assumed that Mrs. Davis could not do all aspects of a clinical program, yet refused to consider possible adjustments to that program for Mrs. Davis. Obsessed with the notion that hearing loss is an absolute obstacle to admission, the College ignored the fact that Mrs. Davis was academically qualified (Pet. App. 77a) and had been a duly qualified LPN since 1967. The College ignored the fact that, in becoming an LPN, Mrs. Davis successfully completed the clinical aspects of her training. As an LPN, she worked at Southeastern General Hospital and in private nursing. Her present employer, the Director of Nursing Services at Southeastern General Hospital, stated that, "I do not believe that I can truthfully state that she would not be able to func-

tion in any area of nursing with her present determination to continue her education." (Pet. App. 141a). The College also ignored the fact that a new hearing aid provided Mrs. Davis "with a significant improvement in her hearing which approaches normal hearing levels." (Pet. App. 127a).

The College's rejection of Mrs. Davis solely on the basis of her hearing loss was endorsed by the district court, which found her unqualified without ever considering possible accommodations for her disability.

The district court's approval of the College's action foreclosed educational advancement for Mrs. Davis in direct conflict with the purpose of the Rehabilitation Act of 1973 and Section 504, "to assist handicapped individuals in achieving their full potential." [1] The court of appeals found the district court erred in supporting the College's rejection of Mrs. Davis solely on the basis of her handicap. The court of appeals' reversal was consistent with the statutory language and legislative intent of Section 504, as well as the subsequently enacted HEW Regulation.

I. The Court of Appeals Held Correctly, Consistent with Section 504 and the HEW Regulation to Implement That Section, That the District Court Erred in Solely Focusing on Respondent's Handicap to Determine Whether She Was Qualified for Admission.

A. The Court of Appeals properly remanded in light of the HEW Regulation that posidates the district court opinion.

The district court did not have the benefit of the HEW Regulation when it rendered its opinion. The

[1] Remarks of Senator Robert Dole, 119 Cong. Rec. 24589-90 (1973).

Fourth Circuit merely applied the law in effect at the time of its decision, *Thorpe* v. *Housing Authority,* 393 U.S. 268 (1969), giving due weight to the interpretation of Section 504 by the agency charged with its administration. *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969); *Udall* v. *Tallman,* 380 U.S. 1 (1965). The only result of the Fourth Circuit's decision is the remanding to the district court for reconsideration of Mrs. Davis' application for admission in light of the Regulation implementing Section 504 that postdates the district court decision. This remand is totally consistent with the action of other circuits in Section 504 cases. See *United Handicapped Federation* v. *Andre,* 558 F.2d 413 (8th Cir. 1977); *Lloyd* v. *Regional Transportation Authority,* 548 F.2d 1277, 1287-8 (7th Cir. 1977). This Court has followed a similar procedure of remanding to reconsider new regulations adopted after a decision in the lower courts. See *Youakim* v. *Miller,* 425 U.S. 231 (1975); *Richardron* v. *Wright,* 405 U.S. 208 (1972); *Thorpe* v. *Housing Authority,* 386 U.S. 670 (1967).

The court of appeals made clear the limited scope of its opinion when it stated, "We do not, at this time, absent a more fully developed record below, wish to expand further upon the regulations, their reasonableness, or their scope." (Pet. App. 8a, n.7a).

The court of appeals reached a narrow decision based on statutory grounds rather than constitutional claims. This established approach has been recently reaffirmed by this Court in *New York City Transit Authority* v. *Beazer,* No. 77-1427 (decided March 21, 1979).

B. The statutory language of Section 504 and its legislative history support the Court of Appeals decision.

Section 504 of the Rehabilitation Act of 1973 provides that, "[n]o otherwise qualified handicapped individual . . . shall, *solely by reason of his handicap,* be excluded from the participation in . . . any program or activity receiving federal financial assistance." 29 U.S.C. § 794, as amended. (emphasis added). In order to enforce that express statutory right, the Fourth Circuit was compelled to strike down the College's rejection of Mrs. Davis solely on the basis of her disability.

Just as earlier statutes sought to erase discrimination against women and minorities,[2] Section 504 was enacted to halt a long history of discrimination against disabled persons. See Hearings on H.R. 8395 Before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare. 92d Cong., 2d Sess. (1972).[3]

[2] Congress has repeatedly recognized the parallels between Section 504 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000e, and Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, *et seq.* In fact, Section 505 of the 1978 Amendments to the Rehabilitation Act expressly extends the rights available under Title VI to persons protected under Section 504. See discussion *infra.*

[3] See Burgdorf & Burgdorf, A History of Unequal Treatment: The Qualifications of Handicapped Persons as a Suspect Class Under the Equal Protection Clause, 15 Santa Clara Lawyer 855 (1975). Another author has concluded that "the effects of earlier misconceptions and ignorance continue to shadow a handicapped person's successful assimilation into society." See, "Civil Rights—Handicapped Discrimination—Private College Required to Provide Interpreter Services for Deaf Student under Section 504 of the Rehabilitation Act of 1973." 8 Cumberland L.Rev. 977, 979 (1978). The author concludes: "the enactment of legislation will not be the end of the struggle for handicapped citizens. Historically, the handicapped have been systematically subjected to purposeful, unequal treatment of considerable scope, degree, and duration. Hopefully, the new legislation and the cases construing it will focus a light on the needs of the handicapped and erase the stigma society has attached to this group. This will be the beginning of a process which must ensure that the handicapped are afforded equal opportunity based on their abilities and are not discriminated against because of their disabilities." at 989.

Congress proclaimed that the "final objective" of the Rehabilitation Act was the "complete integration of all individuals with handicaps into normal community living, working and service patterns."[4] White House Conference on Handicapped Individuals Act of 1974, P.L. 93-516, 88 Stat. 1631, 29 U.S.C. 701 note.

Congress recognized that elimination of the obstacles to education and employment is a critical aspect of securing complete integration of all handicapped persons. Accordingly, the Rehabilitation Act seeks to "initiate and expand services to groups of handicapped individuals . . . who have been underserved in the past," 29 U.S.C. 701(6), and, more importantly, to "promote and expand employment opportunities in the public and

[4] The expansive statutory definition of the class of handicapped persons protected by Section 504 further indicates Congressional intent to achieve the complete integration of all handicapped persons. Section 7(6) of the Act defines "handicapped individual" as any person who:

(a) Has a physical or mental impairment which substantially limits one or more of such person's major life activities;
(b) Has a record of such impairment; or
(c) Is regarded as having such an impairment. 29 U.S.C. 706.

This expansive definition was added by Congress in the 1974 Amendments to the Act in direct response to the broad dictates of Section 504. See SEN.REP.No. 1297, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 6373. Mrs. Davis clearly falls within that statutory definition. See discussion *infra.*

private sectors for handicapped individuals and to place such individuals in employment." 29 U.S.C. 701 (8).

Congress was especially concerned about advancing educational opportunities for handicapped people. The Senate Labor and Public Welfare Committee states in its Report:

> Special attention must be paid to the needs of those individuals who through no fault of their own have *not* received adequate education. These individuals, young adults and adults alike, must be afforded *equal opportunity and access to higher educational services.* The Committee is aware that at the present time *most of these avenues are not open to individuals with handicaps* . . . .

S.REP.No. 1297, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 6408 (emphasis added).

The district court, by allowing the College to deny Mrs. Davis the education she needs to advance to her fullest potential in her profession, has violated that express statutory intent.[5]

When it passed Section 504, Congress recognized that false assumptions and stereotyped notions concerning the inability of disabled persons to participate fully and contribute meaningfully to society had "all too often resulted in the violation of their basic rights as human beings, and had condemned them to lead useless lives." *Id.* at 6400. By imposing a duty not to discriminate on recipients of federal financial assistance, Congress intended to remove these "archaic attitudes" and require recipients to focus on the capabilities of disabled persons. *Id.* at 6400. See also Remarks of Senator Packwood, 119 Cong. Rec. 29633 (1973) and Senator Taft, 119 Cong. Rec. 24587 (1973). Accordingly, "the rationale of Section 504 is that a disability is irrelevant to an individual's potential to contribute to, or benefit from, those activities that the federal government assists." Cook, "Nondiscrimination in Employment Under the Rehabilitation Act of 1973," 27 Am. U.L. Rev. 31, 42 (1977).

In enacting Section 504, Congress sought to prohibit exclusion of handicapped persons from educational programs because of stereotyped assumptions about their inability to participate in such programs. The College's rejection of Mrs. Davis stems from a lack of knowledge about the abilities of handicapped individuals and unwarranted fears of their unsafe performance. Because of the general population's limited experience in living and working with handicapped persons, such prejudices and fears based upon such ignorance have persisted. The College's erroneous assumption that a hearing-impaired person cannot safely and effectively complete the educational requirements to become a registered nurse is contradicted by the very existence of many hearing-impaired persons safely and effectively performing in society every day as nurses, dentists and doctors and as students in nursing, dental and medical schools across the country. The U.S. Civil Service Commission found in its Report on "Employment of Handicapped Individuals Including Disabled Veterans in the Federal Government," (April 30, 1978), that of the federal employees responding to the

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[5] Senator William Jennings Randolph, Chairman of the Subcommittee on the Handicapped, stated that Section 504 was intended to "expand the vistas of opportunity for handicapped individuals." 119 Cong. Rec. 24587 (1973). See also remarks of Senator Dole, n.1, *supra.*

study, there are 156 hearing-impaired nurses now working with the federal government. (See Respondent's Appendix A). The Amicus Briefs of the American Academy for the Advancement of Science and the Legal Aid Society of New York point out numerous other examples of successful practicing hearing-impaired registered nurses, dentists and doctors providing safe and effective care to their patients.

Among the examples given by the Amicus American Academy for the Advancement of Science and the Legal Aid Society of New York are severely hearing-impaired registered nurses who successfully completed registered nursing programs. Erica Herzig is an RN, with a profound hearing loss, who graduated from the Columbia University School of Nursing. She is now safely practicing as an RN providing total patient care in a New York City Hospital. Ann Keenan Ogden is an RN, with a severe hearing loss since age three, who graduated from St. Anthony's School of Nursing in Rockford, Illinois, and she is now working in a hospital in California in advanced care and rehabilitation. Keith Ellen Ragsdale is an RN, with a severe hearing loss since age four, who graduated from Del Mar College in Texas. She has been Acting Assistant Dean of the University of North Dakota College of Nursing. Ms. Ragsdale was a staff nurse in various hospitals in the intensive care—coronary care unit and emergency room.

There are also deaf doctors safely and effectively working with patients. Dr. Frank Hochman's congenital deafness did not prevent him from graduating from Rutgers Medical School. He now has a pediatric practice at San Jose Hospital which includes a patient population that is fifty percent hearing impaired.

The fact that there are such hearing-impaired professionals amply demonstrates the invalidity of the College's position. Ignorant of this reality, the College refused to recognize the possibility that Mrs. Davis could safely and effectively participate in its program, as other hearing-impaired persons have done elsewhere.[6]

Instead, the College allowed its admission process to be dominated by considerations and conclusions based on erroneous stereotypes rather than on Mrs. Davis' abilities. Early in the admissions process, the College focused on Mrs. Davis' disability ignoring her admitted academic qualifications and experience as an LPN. The College failed to consider that Mrs. Davis had been medically certified as mentally and physically able to undertake the nursing school program (App. 120a).

The College ignored the fact that Mrs. Davis had successfully completed the clinical training to become an LPN, and was judged by her employer, as ". . . able to function in any area of nursing with her present determination to continue her education." (App. 177). Instead, the College rejected Mrs. Davis' application, in part, because of "their *feelings* that she would be unable to serve as a Registered Nurse on completion of such a program." (Pet. App. 16a) (emphasis added).[7]

[6] The College refused to even consider ways to modify its program so that Mrs. Davis could safely and effectively participate. (App. 86a). Yet Congress recognized that in many instances, auxiliary aids and program modifications alleviate any safety fears and enable the disabled person to maximize her talents. See discussion *infra*.

[7] The College ignored her employer's further statement that "I would employ Mrs. Davis in our skilled nursing facility if I had a vacancy. . . ." (Pet. App. 179).

The College consistently chose to ignore reality and focused instead upon speculative fears based on false assumptions. The College insisted that Frances Davis, a woman whose hearing "approaches normal levels" (Pet. App. 127a), and experienced LPN with the highest recommendations from her employer, was not qualified solely because of her disability. A pattern emerges of a college admissions decision influenced by stereotyped notions concerning the applicant's disability. It was a decision dominated by the "archaic attitudes" that Congress sought to overcome with the enactment of Section 504. The district court upheld the College's decision. The court of appeals, however, recognized Congress precluded this sole focus on disability in its efforts to achieve the complete integration of all handicapped persons.

C. The properly authorized HEW Regulation implements Congressional intent

The Fourth Circuit properly gave great weight to HEW's Section 504 Regulation.[8] The Regulation was

[8] Congress clearly intended for the Regulation to be promulgated under Section 504, as the Senate Committee Report on the 1974 Amendments to the Act explains:

> [Section 504] does not specifically require the issuance of regulations or expressly provide for enforcement procedures but it is clearly mandatory in form and such regulations and enforcement are intended. S.REP.No. 1297, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 6440.

Congress further intended that those regulations were to be swiftly implemented by the close of 1974. *Id.* at 6391.

Not only was the Regulation authorized by Congress and issued pursuant to Executive Order No. 11914, 3 C.F.R. § 117 (1976), but it was also ordered by a federal district court in Cherry v. Mathews, 419 F.Supp 922 (D.D.C. 1976). The Court found, on the basis of the House and Senate Reports on the 1974 Amendments, that Congress intended swift implementation of Section 504 through a comprehensive set of regulations. Stating that "the statute's discrimination prohibitions were certainly not intended to be self-executing," the court ordered the Secretary of HEW to promulgate the Regulation without further delay. 419 F.Supp. at 924. See also Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1238 (7th Cir. 1977).

Section 505(a)(1) of the 1978 Amendments to the Rehabilitation Act expressly codifies the statutory delegation of authority for promulgation of regulations by making the rights, remedies and procedures available under Title VI equally applicable to Section 504. Title VI contains an express statutory delegation of authority for promulgation of regulations. 42 U.S.C. 2000(d). See also S. Rep. No. 820, 95th Cong., 2d Sess. 19 (1978).

carefully developed after an exhaustive and comprehensive rulemaking process involving public comment from recipients, state and local governmental units, and affected organizations.[9] Thus, when that extensive regulatory effort to effectuate Congressional intent was completed on April 28, 1977, Secretary Califano declared:

> In sum, the regulation issued today reflects my best judgment of how Congress intended that the broad

[9] Over three hundred written comments were received in response to HEW's Notice of Intent to Issue Proposed Rules. The written comments were supplemented by a series of ten meetings conducted by the Office for Civil Rights at various locations across the country. On *July 16, 1976,* the Department published a Notice of Proposed Rulemaking, analyzing the public comments received on the critical proposed regulation for further public comment. A total of more than 850 comments were received and analyzed. An additional twenty-two public meetings were held after publication of the July 16 Notice, again designed to inform interested persons and organizations of the proposed regulations and to solicit their comments and recommendations. Transcripts of all these meetings were made, and analyzed along with the written comments.

uncompromising statutory command of Section 504 should be translated into specific rules that vindicate the rights of handicapped citizens and that deal firmly, yet sensibly, with those recipients of Federal funds who will be subjected to significant new requirements.[10]

On numerous occasions this Court has determined that administrative interpretation of a statute by the enforcing agency is entitled to "great deference." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). The Fourth Circuit gave that "great deference" to the statutorily delegated, carefully developed, HEW Regulation which effectuates Congressional intent that colleges and other programs which receive federal funds shall not exclude disabled persons "solely on the basis of their handicap." 29 U.S.C. § 794.

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[10] In signing the 504 Regulation, Secretary Califano further noted that Section 504 was enacted because "for decades, handicapped Americans have been oppressed and, all too often, a hidden minority subjected to unconscionable discrimination, beset by demoralizing indignities, detoured out of the mainstream of American life and unable to secure their rightful role as full and independent citizens."

The Regulation was intended to "open a new world of equal opportunity for the more than 35 million handicapped Americans. The 504 Regulation attacks the discrimination, the demeaning practices and the injustices that have afflicted the nation's handicapped citizens. It reflects the recognition of the Congress despite their disabilities. It will usher a new era of equality for handicapped individuals in which unfair barriers to self-sufficiency and decent treatment will begin to fall before the force of law." See Statement of Joseph A. Califano, Secretary, Department of Health, Education and Welfare, April 29, 1977.

D. The HEW Regulation also supports the Court of Appeals' decision

The HEW Regulation establishes a carefully designed regulatory scheme effectuating congressional intent to ensure a nondiscriminatory admissions process in postsecondary educational programs. The major thrust of the Regulation is to evaluate handicapped applicants on the basis of their qualifications, not their disabilities. Only then can the handicapped applicants receive an equal opportunity to participate in federally funded programs without being screened out at the admissions stage.

The Regulation, however, does not preclude consideration of an applicant's handicap. The Regulation allows colleges to evaluate a qualified student's handicap for purposes of determining what academic adjustments, if any, can be made to enable the student to participate in the program. 45 C.F.R. §§ 84.42(b)(4) and 84.44. Academic adjustments are essential to ensure that handicapped students receive equally effective treatment. See discussion *infra*. At the admissions stage, however, undue focus on an applicant's handicap often results in the rejection of qualified handicapped persons because of their disabilities. This is precisely what happened to Mrs. Davis.

The College's major error, as the Fourth Circuit recognized, was this sole focus on Mrs. Davis' hearing impairment rather than on her "academic and technical" qualifications, as required by 45 C.F.R. § 84.3(k)(3) of the Regulation. That section defines a "qualified handicapped person" for purposes of postsecondary education as one who "meets the academic and technical standards requisite to admission . . . ."

This definition works together with the ban on pre-admission inquiries into an applicant's handicap, 45 C.F.R. § 84.42(b)(4),[11] and the ban on future employability inquiries, 45 C.F.R. § 84.43(c), to require colleges to focus on an applicant's qualifications, not his or her physical handicap.

According to the College, the "technical standards" referred to in 45 C.F.R. § 84.3(k)(3) include physical qualifications.

Technical standards are defined in the analysis to the Regulation as "all nonacademic admissions criteria that are essential to participation in the program in question." 42 Fed. Reg. 22687 (1977). "Technical standards" include such factors as work experience, degree prerequisites or residency requirements.

To permit consideration of handicap as a technical standard would circumvent the ban on preadmission inquiry (45 C.F.R. § 84.42(b)(4)) and its underlying § 504 statutory policy that schools must impartially look at an individual's abilities without the distorting influence of "archaic attitudes."[12] Allowing physical

[11] The purpose of the ban on preadmission inquiries is to prevent schools from considering handicap at the admission stage since stereotyped misconceptions and prejudices usually take over to screen out qualified persons as soon as their handicaps are known. The ban reduces the potential for such discrimination, especially with respect to persons with non-visible handicaps. To prevent this dangerous distortion of admission decision-making, the Regulation delays any inquiry into an applicant's handicap until after the applicant has been found academically and technically qualified. After that, the College can consider a person's handicap for the purpose of making modifications in its program.

[12] The American Council on Education and the American Association of Collegiate Registrars and Admissions Officers support the ban on pre-admission inquiry. See *The American Association of Collegiate Registrars and Admissions Officers and The American Council on Education, Recruitment, Admissions, and Handicapped Students: A Guide for Compliance With Section 504 of the Rehabilitation Act of 1973 April, 1978.*

handicap to be considered through the back door as a technical qualification could exclude all handicapped applicants. For example, since legal materials are printed and not usually found in Braille, law schools could argue that sight is a "technical" requirement and on that basis, exclude all blind applicants.

If hearing could be considered a "technical" requirement, an applicant could be excluded at the outset of the admissions process, regardless of whether or not some academic adjustment could be made that would enable a student to effectively participate in a program. This is clearly what HEW intended to avoid by requiring academic adjustments. See 45 C.F.R. § 84.44 and discussion *infra*.

The College contends that because Mrs. Davis is hearing-impaired, she cannot perform the essential functions of the clinical program. In so doing, the College adopts in part the employment definition of qualified handicapped person, i.e., a handicapped person who, "can perform the essential functions of the job in question." 45 C.F.R. § 84.3(k)(1). Yet the district court has not made a finding of fact that any part of the clinical program is essential. Furthermore, the College omits the second part of the employment definition, that is, whether the employee can perform the essential functions of the job, "with reasonable accommodation." The Fourth Circuit found that the College would not modify its nursing program.

Finally, and most importantly, it must be remembered that this is not an employment case, but a post-

secondary education case. The College errs in equating an applicant for college nursing program with an applicant for a particular job. The HEW Regulation makes no such error.

The Regulation for both policy and practical reasons refuses to equate the two. Instead, because of the diversity of types of handicaps, as well as the wide variety of settings in which programs financed by HEW are offered, 42 Fed. Reg. 22676 (1977), HEW recognized the need to define, "qualified handicapped person," in four ways, depending upon the type of federally assisted program at issue—(1) employment, 45 C.F.R. § 84.3(k)(1); (2) preschool, secondary, and adult education, 45 C.F.R. § 84.3(k)(2); (3) postsecondary education, 45 C.F.R. § 84.3(k)(3) and (4) program accessibility and health, education, welfare, and social service, 45 C.F.R. § 84.3(k)(4).[13]

The Congressional purpose of ensuring equal opportunity and full participation in society for all handicapped individuals could not have been realized had HEW defined "qualified handicapped person" in only one way.[14] It would be contrary to the regulatory pur-

[13] The HEW Regulation uses the term "qualified handicapped person" and "otherwise qualified handicapped person" synonymously under its Regulation. 42 Fed. Reg. 22686 (1977).

[14] The same definition of "qualified handicapped person" for all different programs and activities funded by HEW would not make any practical sense. A handicapped person who "meets the essential eligibility requirements" and is thus "qualified" to receive food stamps may not be "qualified" to "perform the essential functions" of a particular job. Conversely, a handicapped person, who is "qualified" and actually receiving a salary for a particular job, would not meet the essential eligibility requirements to be "qualified" to receive food stamps.

pose and legislative intent to define "qualified handicapped person" in the same way for postsecondary education as for employment. A handicapped person may not be qualified for a particular job until after that person has attained certain education skills.[15] While an employer has a valid interest in hiring qualified persons, exclusion of handicapped applicants from admission to colleges and universities impedes rather than promotes this interest. By defining "qualified handicapped person" differently in the context of postsecondary education and employment, HEW sought to avoid this cause and effect relationship in which discrimination in education perpetuates the unemployment and under-employment of handicapped persons. S.Rep.No. 1139, 93d Cong. 2d Sess. 32 (1974).

The purpose of clinical training, unlike actual employment, is to provide a controlled supervised setting for learning practical skills. That is why HEW included vocational training within the scope of postsecondary education, rather than employment.

A college may not refuse to admit a handicapped person simply because employment opportunities in any occupation may be more limited.[16] At the time of

[15] For example, there are obviously different qualifications required for a law school applicant than for a person applying for a position as a lawyer. Indeed a law school degree is one prerequisite to obtaining employment as a lawyer. A law school would not condition its acceptance of an applicant on the applicant's assurance of future employment because no law firm would provide the applicant with that assurance prior to entering law school.

[16] 45 C.F.R. §§ 84.10(b) and 84.43(c). The HEW Analysis to 45 C.F.R. § 84.43(c) explains that "this paragraph is designed to eliminate the practice of excluding handicapped persons from specific courses and areas of concentration because of . . . assump-

Mrs. Davis' application, regardless of her ability to do the educational work, the college was unwilling to certify that she could practice and be licensed as an RN because of her hearing limitations. (Pet. App. 48A). No professional school, such as a law school, can predict, before a student enters a program, that a student will pass the licensing tests, such as a state bar, or will get a job after graduation.

Indeed, the Director of the State Board of Nursing indicated that it could not predict Mrs. Davis' eligibility for licensing at some time in the future (Pet. App. 139A). The Fourth Circuit properly noted that "we do not have before us the question of "limited" versus "unlimited" certification of the plaintiff as an RN. If the plaintiff meets all the other criteria for admission in the pursuit of her RN career, under the relevant North Carolina statutes, N.C.Gen.Stat. §§ 90-158, *et seq.*, it should not be foreclosed to her simply because she may not be able to function effectively in all the roles which registered nurses may choose for their careers." [Pet. App. 6a]. Clearly, the purpose of Section 504 and the HEW Regulation is to ensure that persons applying for post-secondary education programs are judged on their qualifications to enter *that particular program,* and not on the basis of speculation about their prospects once the program is successfully completed.

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tions by the recipient that no job would be available in the area in question for a person with that handicap." 42 Fed. Reg. 22692 (1977). See also 45 C.F.R. 84.10(a) which states that a college may not refuse to admit a handicapped person simply because State law would impose "prohibitions or limits upon the eligibility of handicapped persons . . . to practice any occupation or profession."

II. The Court of Appeals Was Correct in Suggesting That the District Court Give Close Attention on Remand to Affirmative Relief in Light of the District Court's Failure to Consider any Accommodation for Respondent's Handicap.

As essential and undisputed fact in this case is that the College refused to modify its nursing program to accommodate Mrs. Davis' hearing-impairment. The College was unwilling to make any curriculum modifications to aid any handicapped person in pursuing a career in nursing. (App. 86a).

The College asserts that Section 504 does not authorize any kind of "affirmative relief." But this issue is not properly before this Court.[17] As noted by the Fourth Circuit, the issue of affirmative relief was not raised before the district court, but was advanced for the first time before the circuit court. It was thus entirely proper and fair for the circuit court to identify the issue of "affirmative relief" and suggest that, on remand, the district court give close attention to academic adjustments required by the HEW Regulation issued after the district court decision.

In remanding, the Fourth Circuit thus responded to the College's refusal to modify its nursing program, noting the contradiction between the college position and the HEW Section 504 Regulation.

The Fourth Circuit then concluded that case law, in addition to the Section 504 Regulation, "likewise sup-

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[17] This Court has consistently refused to consider issues which had not been pleaded, proved or briefed either in federal district court or the circuit courts. Since Mirce v. Dekalb County, Ga., 433 U.S. 25 (1977); Stone v. Powell, 428 U.S. 465 (1976), *rehearing denied,* 429 U.S. 874 (1976); U.S. v. Estate of Donnelly, 397 U.S. 286 (1970).

ports the requirements of affirmative conduct on the part of certain entities under Section 504 . . . ." (Pet. App. 9a).

Assuming *arguendo* that the issue is properly before this Court, the College errs in asserting that Section 504 does not authorize any kind of affirmative relief. Congressional and judicial action make clear that Section 504 does in fact require affirmative relief to ensure equal access by handicapped persons to federally assisted education and employment programs.

The Senate Report, accompanying the 1974 Amendments to the Rehabilitation Act, expressly states that: "Where applicable, Section 504 is intended to include a requirement of affirmative action as well as a prohibition of discrimination." S.REP.NO. 1297, 93d Cong. 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 6390.[18]

Legislative intent in support of affirmative conduct under Section 504 was further demonstrated in congressional oversight hearings in 1977 [19] and in the enact-

[18] Courts have long adhered to the principle that subsequently enacted legislation declaring the intent of an earlier statute is entitled to great weight in statutory construteion. Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969); FHA v. Darlington, 358 U.S. 84 (1958); Glidden v. Zdanok, 370 U.S. 530 (1962).

[19] Members of the House Subcommittee on Select Education of the Committee on Labor and Education, directed questions to David Tatel, Director of HEW's Office for Civil Rights, regarding modifications in educational opportunities for handicapped students, building accessibility requirements, and interpreters for deaf college students. Thus, Congress was clearly aware of the affirmative obligations required by HEW's Selection of 504 Regulation. See Hearings on Implementation of Section 504 of the Rehabilitation Act of 1973 before Subcommittee on Select Education of the House

ment of the 1978 Rehabilitation Act Amendments. At the time of both the 1977 hearings and the 1978 Amendments, Congress was clearly aware of the affirmative obligations required by the HEW Regulation to Section 504. Yet nothing in the 1978 Amendments overrules the Regulation. Congressional reenactment without revising the affirmative obligations imposed by the HEW regulation confirms that these affirmative obligations were in fact intended by Congress.[20]

Courts have similarly found that affirmative obligations are imposed by Section 504. In *Lloyd* v. *Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977), the Seventh Circuit held that Section 504 imposes affirmative duties upon transportation officials to adapt mass transit vehicles and services to accommodate mobility impaired persons.

> There is no equality of treatment merely by providing the handicapped with the same facilities as ambulatory persons . . . ; for handicapped persons who cannot gain access to such facilities are effectively foreclosed from any meaningful public transportation.

548 F.2d at 1284.

Committee on Education and Labor, 95th Cong., 1st Sess., pp. 359-366 (1977) [hereinafter referred to as 1977 House Oversight Hearings].

[20] Congressional failure to revise or repeal an agency interpretation has long been recognized as indicative of Congressional acquiescence in the agency interpretation. Zemel v. Rusk, 381 U.S. 1, 11-12 (1965); Costanzo v. Tillinghast, 287 U.S. 341 (1932); Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294, 313 (1933); Commissioner of Internal Revenue v. Estate of Noel, 380 U.S. 678, 682 (1965); N.L.R.B. v. Gullett Gin Co., 340 U.S. 361, 365-366 (1951).

This reasoning was adhered to in *United Handicapped Federation* v. *Andre,* 558 F.2d 413 (8th Cir. 1977) in which the Eighth Circuit found that Section 504 creates affirmative duty on the part of mass transit recipient who were required to conform to the regulation and guidelines. "It is difficult to assess the record and the statute in any other light." 558 F.2d at 416. Four circuit courts have found that affirmative obligations are imposed by Section 504. None have held to the contrary. *Davis* v. *Southeastern Community College,* 574 F.2d 1158 (1978), *cert. granted.* Jan. 8, 1979; *Doe* v. *Colautti,* #78-1828 (3rd Cir. Feb. 8, 1979).

The College further argues that even if Section 504 requires affirmative relief, no such relief is available to Mrs. Davis in this case. This argument was not raised before the district court, nor the circuit court, but is advanced by the College for the first time in this Court. This is yet another issue not properly before the Court. The district court made no determination on any academic adjustment for Mrs. Davis and the Fourth Circuit properly remanded for the taking of evidence on this issue.

The College is left in the untenable position of arguing that there are no academic adjustments for Mrs. Davis. Yet the College refused to make any modifications to its nursing program. The very purpose of academic adjustments is to enable qualified handicapped students to overcome their physical disabilities so that they can effectively participate in the post-secondary education program.

The Regulation precludes consideration of handicap at the admissions stage to avoid the stereotyped misconceptions and prejudices which have been found to

screen out qualified applicants once their handicaps are known. This is exactly what happened to Mrs. Davis. Discussion *supra.* But once the handicapped person has been found "otherwise qualified," her disability becomes relevant to a determination of academic adjustments. At this stage, inquiry into handicap enables the college to make an informed decision of what adjustments, if any, can be made to allow the disabled student to participate in the program and to achieve her full potential. But as the Fourth Circuit explained, the College "... was not prepared, from a faculty viewpoint, to adequately supervise and train the plaintiff during her clinical training. Therefore, it could not modify its program to compensate for plaintiff's hearing disability." (Pet. App. 9a). Yet, HEW recognized the need for academic adjustments. Often handicapped persons are not provided an equal opportunity merely by providing them with the same facilities, the same programs, and the same teachers provided to non-handicapped persons. Thus, the Regulation requires recipients to provide special services to ensure that handicapped persons receive "equally effective," benefits and treatment. The HEW Analysis explains, "the term 'equally effective' . . . is intended to encompass the concept of equivalent, as opposed to identical services and to acknowledge the fact that, in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhandicapped are met, adjustments to regular programs or the provisions of different programs may sometimes be necessary." 42 Fed. Reg. 22687 (1977). "Identical treatment may in fact constitute discrimination." See remarks of former HEW Secretary Matthews, 41 Fed. Reg. 20296 (1976). As HEW Secretary Califano

pointed out in the comments preceding the Regulation to Section 504:

> . . . it is meaningless to "admit a handicapped person in a wheelchair to a program if the program is offered only on the third floor of a walk-up building, nor is one providing equal educational opportunity to a deaf child by admitting him or her to a classroom but providing no means for the child to understand the teacher or receive instruction.

42 Fed. Reg. 22676. (1977)

Accordingly, the HEW Regulation imposes specific academic adjustment obligations on colleges and universities.[21] Modifications include changes in the length of time permitted to complete degree requirements, substitution of specific courses, and adaptation of the manner in which courses are conducted. 45 C.F.R. § 84.44(a). The Regulation further requires colleges and universities to provide auxiliary learning aids, such as sign language interpreters for deaf students and

[21] Affirmative relief requirements are specified throughout the Regulation. See 45 C.F.R. § 84.6(a) (remedial action required of all recipients to overcome the effects of discrimination) 45 C.F.R. §§ 84.31-37 (duty of public elementary and secondary schools to provide free, appropriate public education to all handicapped children); 45 C.F.R. § 84.52(c) (hospitals' duty to establish procedure for effective communications with deaf patients in emergency health care situations); 45 C.F.R. § 84.52(d) (duty of health, welfare and social service agencies with 15 or more employees to provide appropriate auxiliary aids to persons with impaired sensory, manual or speaking skills) 45 C.F.R. §§ 84.21-23 (duty of all recipients to make their programs and facilities readily accessible to and usable by handicapped persons); 45 C.F.R. § 84.12 (employers' duty to make "reasonable accommodations" for the physical and mental limitations of qualified handicapped employees and applicants).

readers for blind students. 45 C.F.R. § 84.44(d).[22] Determinations concerning specific adjustments will depend on the facts of each particular case. But in this case, the district court made no determination on any academic adjustments. Accordingly, the Fourth Circuit remanded for the taking of evidence on this issue.

No testimony was taken nor did the College even consider what academic adjustments, if any, are necessary in this case. Evidence on whether any accommodations had been made for Mrs. Davis in her academic and clinical training as an LPN would help assess possible academic adjustments for the College's Nursing Program. It would also be helpful to take evidence on Mrs. Davis' past experience in private duty nursing and her current employment as an LPN at Southeastern General Hospital. The College never even discussed possible academic adjustments with Mrs. Davis. The HEW Regulation recognized that the handicapped individual is often in the best position to know which

[22] It is not appropriate to equate academic adjustments necessary to ensure equal opportunity in this case with the accommodations standards laid down in TWA v. Hardison, 432 U.S. 63 (1977), a case involving a discharge of a worker for refusing to report on Saturday for religious reasons. In addition to breaching a valid collective bargaining agreement, an accommodation in Hardison would have amounted to unequal treatment of employees because of their religious beliefs. The Hardison case, dealing with religious discrimination in employment, is easily distinguishable from this handicapped discrimination case. Post-secondary educational institutions have signed an Assurance of Compliance Form with HEW agreeing to follow the Regulation. Thus, failure to abide by "affirmative relief" sections of the Regulation would breach a valid contract between recipients and HEW. Second, academic adjustments, unlike accommodation for religious reasons, do not infringe on any rights of other students. In fact, in making such adjustment, it is indeed possible that all students will benefit.

accommodations are necessary. See 45 C.F.R. § 84.6(c) and its corresponding HEW Analysis, 42 Fed. Reg. 22687 (1977).

Advances in medical technology have enabled many hearing-impaired registered nurses and doctors to function safely and effectively through the use of aids, *e.g.*, an electronic amplifying stethescope to hear lung sounds, a sphygomoanometer to measure blood pressure, improved hearing aids, phone amplifiers, and teletypewriters. These hearing-impaired professionals, who have already demonstrated safe performance in the medical field would be a valuable resource on effective academic adjustments.[23]

[23] See also Redden, Martha R., Cheryl A. Davis, & Janet W. Brown, "Science for Handicapped Students in Higher Education," American Association for the Advancement of Science, AAAS Pub. 78-R-2, 1978. The authors identified barriers to postsecondary science education and methods for overcoming them. Special interest was given to disciplines requiring laboratory, clinical, or field work. The most limiting barriers and the hardest to combat were those defined as attitudinal. "After the professor changed his mind about my capabilities, all those course modifications were made easily." Consultation with a "role model" scientist was seen as one way to counteract stereotyping and to change attitudes about accommodation to a handicap. "It is difficult to look down, for example, on a deaf scientist like Dr. Myron Weinberger (Associate Professor of Medicine at Indiana University), who supervises a research team of more than thirty people or confront the deaf chemist, Dr. John Cornforth, who recently won the nobel prize." at 23. See also Brown, "Who are the Handicapped Scientists?" 190 *Science* 546 (11/7/75), in which the author reports ". . . successful handicapped scientists have required extraordinary, almost unbelievable, perseverence to achieve an education. . . ." "All of them can tell stories of the professor who, having no experience with the handicapped, routinely dismissed their abilities in the assumption that . . . they would not be able to keep up with the reading because they were blind, or would not be safe in the laboratory because a limb did not function. One deaf woman chemist was required to undergo an additional examination to get her Ph.D., after she had completed with honors all the requirements demanded of her normal colleagues. . . ." "Although the myth that handicapped workers present additional safety hazards has been disproven in practice, this concern is still widely used by employers to reject handicapped applicants." (Citing James H. Sears, "The Able Disabled," *Chemtech* (December 1974), pp. 713-15. [Many handicapped scientists] hope that changing attitudes will make it possible for all bright, able, scientifically-inclined youngsters to choose science without having to be super-achievers in order to reach their goals." 190 *Science* 546, at 546, 593.

The College's conclusion that Mrs. Davis would be unsafe simply cannot be made until after the college has carefully reviewed its nursing program in light of the academic adjustments section of the HEW Regulation.[24]

[24] The College's reliance on Hodgson v. Greyhound Lines, 499 F.2d 359 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1957); Usery v. Tamiami Tours, 531 F.2d 224 (5th Cir. 1976), both cited in Pet. Bf. at 46, is misplaced. First, the rationale of Greyhound and Tamiami has been seriously undermined by later cases, all of which have demanded strict proof of casual relationships between age and inability to safely perform job-related tasks, in a wide variety of jobs. See, e.g., Houghton v. McDonnell Douglas Corp., 553 F.2d 561, 564 (8th Cir.) (Clark, Cir. J.) *cert. denied*, 434 U.S. 966 (1977) (test pilots); Rodrigues v. Taylor, 428 F.Supp. 1118 (E.D. Pa. 1976) (police officers). Second, even if the Court were inclined to follow Greyhound and Tamiami, those cases are distinguishable, in that their respective trial courts received massive quantities of evidence indicating both mental and psychological charges inherent with aging precluded safe performance of particularized essential job tasks. Contrast the case before the Court, in which the College has failed to identify essential abilities necessary to participate safely in its educational program, failed to test Mrs. Davis' abilities to so participate, and failed to consider the impact of the provision of academic adjustments, or auxiliary aids, on those abilities as required by the HEW Regulation.

Consideration of academic adjustments avoids stereotyped assumptions about the capabilities of handicapped persons.[25] The College has refused to determine what adjustments are necessary. The district court rubber-stamped the conclusory assertions regarding the inability of Mrs. Davis to safely and effectively perform in the clinical program. The appeals court properly remanded, suggesting that the district court consider the issue of academic adjustments, thus enabling handicapped people to achieve their full potential.

III. A Private Right of Action Exists Under Section 504

A. Section 504 meets the *Cort* v. *Ash* requirements for implying a private right of action.

Every circuit court that has considered the issue has found that a private right of action to enforce Section 504 must be implied under the tests established by this Court in *Cort* v. *Ash,* 422 U.S. 66, 78 (1975).[26]

[25] The college now attempts to assert in its argument that the requirements for a student are coextensive with those of a Registered Nurse. Pet. Bf. at 43. Furthermore, it attempts to construct new situations in which Mrs. Davis might not be able to perform. Pet. Bf. at 44. There is no basis for these contentions in the record, and "a reviewing court is not ordinarily justified in relying on arguments . . . that were not first presented to the trial court." Dothard v. Rawlinson, 433 U.S. 321, 330 (1977) (Rehnquist, J., concurring).

[26] See Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977); Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977); United Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir. 1977); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977); Davis v. Southeastern Comm. College, 574 F.2d 1158 (4th Cir. 1978); Doe v. Colautti, #78-1828 (3d Cir. Feb. 8, 1979).

In *Cort,* the Court listed the following four requirements which must be met to imply a private right of action under a statute which does not explicitly provide for one:

1. Is the Plaintiff "one of the class for whose *especial* benefit the statute was enacted."
2. Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one?
3. Is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the Plaintiff?
4. Is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?

The present suit meets all four of the *Cort* requirements for implying a private right of action.[27]

1. *Frances Davis Is One of the Class for Whose Especial Benefit Section 504 Was Enacted.*

This first *Cort* factor is easily met, for as the Senate Committee Report on the 1974 Amendments to the Act proclaimed, "Section 504 was enacted to prevent dis-

[27] Mrs. Davis also sued pursuant to 42 U.S.C. § 1983, which provides a cause of action to redress deprivation, under color of law, of rights secured by the laws of the United States. Congress surely displayed no intention to foreclose a private suit under Section 1983 against a state college to enforce personal rights guaranteed by Section 504. The Fourth Circuit declined to reach Petitioner's Section 1983 claim, basing its decision thus far only on Section 504. Pet. App. 10a.

crimination against *all handicapped individuals* . . . in relation to Federal assistance in employment, housing, transportation, education, health services, or any other federally-aided programs." S.REP.No. 1297, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373, 6388. (emphasis added). See also *Kampmeier* v. *Nyquist,* 553 F.2d at 299 (2d Cir. 1977) ("Section 504 . . . is designed specifically for their protection"); and *Lloyd* v. *Regional Transp. Auth.,* 548 F.2d at 1285, n. 25.

Section 7(6) of the Rehabilitation Act, 29 U.S.C. 706(6) *as amended,* defines "handicapped individual" as any person who:

> (a) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (b) has a record of such impairment, or (c) is regarded as having such an impairment.

Frances Davis, as a hearing-impaired woman, is obviously a "handicapped individual" within the meaning of Section 7(6). She is therefore "one of the class for whose *especial* benefit the statute was enacted." *Cort,* 422 U.S. at 78. In fact, the College does not dispute that Mrs. Davis meets this first *Cort* factor. Petitioner's Brief at 59.[28]

[28] Several commentators have concluded that this first *Cort* factor is the most important consideration in implying a private right of action. "Indeed, in nearly every Supreme Court case since *Cort,* although the Court goes through the four tests seriatum, the resolution of the first Cort factor seems to be the deciding issue." M. Seng., "Private Right of Action," 27 DePaul L. Rev. 1117, 1123, N. 30 (1978). See also "Toward Equal Rights for Handicapped Individuals· Judicial Enforcement of Section 504 of the Rehabilitation Act of 1973, 38 Ohio State L.J. 667 (1978). The 32 States as Amici Curiae in Support of the Petitioner contend that ". . . one may not assume that a Plaintiff under Section 504 will meet the first prong of the *Cort* test [because] section 504 pertains only to 'otherwise qualified handicapped individuals,' and this involves a preliminary determination by the court." Amici's Brief at 30. Of course, Section 504 pertains only to "otherwise qualified" handicapped individuals, and of course this involves a court determination. But whether a handicapped person is "otherwise qualified" does not affect his/her right to *access to the court* for a determination of that issue. Instead, it affects the validity of her claim on the merits. While all handicapped plaintiffs may not be "otherwise qualified" and hence not entitled to relief on the merits, all have the *right to sue* for a determination of that and other issues affecting the validity of their claims. Section 504 was enacted for the "especial benefit" of all handicapped individuals, not just for those who are "otherwise qualified." Indeed, in this and several other cases, courts have implied a private right of action and *then* decided the issue of whether plaintiff was "otherwise qualified" and hence entitled to relief. See Whitaker v. Bd. of Higher Education of City of NY, 77-C-2258 (E.D.N.Y. Oct. 17, 1978); Davis v. Bucher, 451 F.Supp. 791, 797 (E.D. Pa. 1978); Kampmeier v. Nyquist, 553 F.2d at 299.

2. *There Is Explicit Indication of Congresional Intent to Create a Private Right of Action Under Section 504.*

Where it is clear that the Plaintiff is one of the class for whose *especial* benefit the statute was enacted, "it is not necessary to show an intention to *create* a private cause of action. . . ." *Cort,* 422 U.S. at 82. Accordingly, under *Cort,* Respondent need not demonstrate any specific Congressional intent to create a private right of action.

Nonetheless, such Congressional intent exists in abundance. Both the language and the legislative history of the 1978 Amendments to the Rehabilitation Act support a private right of action. By its very terms, the statutory language of Section 505(b) of the

1978 Amendments expressly recognizes the right to maintain a private action.

> *In any action or proceeding to enforce or charge a violation* of a provision of this Title [V], the court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorney's fee as part of the costs.

92 Stat. 2983.

The Senate Committee Report [29] on the 1978 Amendments unequivocably explains the purpose of the attorneys' fees section as follows:

> The Committee believes that the rights extended to handicapped individuals under Title V . . . are, and will remain in need of vigilance by handicapped individuals to assure compliance, and the availability of attorneys' fees should assist in vindicating private rights of action . . . under . . . 504.

S.REP.No. 95-820, 95th Cong., 2d Sess. 19 (1979) (emphasis added).[30]

During the Senate floor debate on the 1978 Amendments, Senator Alan Cranston, the Majority Whip, further elaborated on the importance and purpose of the attorneys' fees section:

> Private enforcement of these Title V rights is an important and necessary aspect of assuring that these rights are vindicated and enforcement is uniform. The availability of attorneys' fees should assist substantially in this respect. . . . The Amendment adopted by the Committee would help assure that handicapped individuals will be able to have access to the judicial process in order to assert their rights under Title V.

124 Cong. Rec. S15593 (Sept. 20, 1978). (remarks of Senator Cranston)

Thus, the attorneys' fees section of the 1978 Amendments and its legislative history lead to the inescapable conclusion that there is a private right of action under Section 504.[31]

Section 505(a)(2) of the 1978 Amendments again recognizes the existence of a private right of action. It provides as follows:

> The remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved . . . under § 504.

92 Stat. 2982.

The rights and remedies available under Title VI, and hence now applicable to Section 504, include a private right of action. See *Regents of Univ. of California* v. *Bakke,* 98 S.Ct. 2733, 2814-2815; *Lau* v. *Nichols,* 414

[29] The Senate version of Section 505(b) was accepted by the House-Senate Conference Committee. See H.R.REP.No. 95-1780, 95th Cong., 2d Sess., reprinted in [1979] U.S. Code Cong. & Ad. News 7553, 7582.

[30] The Committee Report goes on to cite with approval the testimony of Debra Kaplan of the Disability Rights Center, who testified at length on the urgent need for attorneys' fees to encourage private rights of action. *Id.* at 19.

[31] This Court has long adhered to the principle that subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. Red Lion Broadcasting v. F.C.C., 395 U.S. 367 (1969); FHA v. Darlington, 358 U.S. 84 (1958); Glidden Co. v. Zdanok, 370 U.S. 530 (1962). Any language in Teamsters v. United States, 431 U.S. 324, n. 39 (1977), minimizing the effect of subsequent legislative history, does not apply to the present case. Here, unlike the situation in Teamsters, the 1978 Amendments relate specifically to the statutory provision upon which Respondent relies and show unambiguously Congressional intent to create a private right of action under the statute.

U.S. 563 (1974); *Bossier Parish School Bd.* v. *Lemon,* 370 F.2d 847 (5th Cir. 1967), *cert. denied,* 338 U.S. 911 (1967); *Serna* v. *Portales,* 499 F.2d 1147 (10th Cir. 1974). When Congress passed Section 505(a)(2), the presence of a private remedy under Title VI had been clearly developed. In fact, Senate floor debate on the 1978 Amendments reveals that Congress was quite aware of judicial recognition of a private right of action under Title VI. The following dialogue between Senators Cranston and Bayh is particularly illuminating:

> Mr. BAYH. Senator Cranston, is my understanding correct that section 505 merely extends to the handicapped the same remedies, procedures and rights already extended through title VI and VII of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972 to individuals discriminated against on account of race, color, religion, sex or national origin?
>
> Mr. CRANSTON. My colleague from Indiana (Mr. Bayh) is correct.
>
> Mr. BAYH. When title VI was first enacted in 1964, Congress intended to create a private right of action for aggrieved individuals. The circuit courts of the United States have clearly acknowledged this congressional intent in such cases as *Bossier Parish School Board* v. *Lemon,* 370 F.2d 847 (5th Cir. 1967), *Alvarado* v. *El Paso Indep. School Dist.,* 445 F.2d 1011 (5th Cir. 1971), *Kelley* v. *Altheimer, Arkansas Pub. School Dist. No. 22,* 378 F.2d 483 (8th Cir. 1967) and *Cypress* v. *Newport News Gen'l and Non-sect. Hosp. Assoc.,* 375 F.2d 648 (4th Cir. 1967). As the Senator knows, the Supreme Court recently spoke on this issue in the *Bakke* case.
>
> Mr. CRANSTON. I agree with my colleague from Indiana (Mr. Bayh). In the recent court case of *Bakke* against *Regents of the University of California,* eight Supreme Court Justices determined that, with respect to the availability of a private right of action, the question was raised too late in the proceeding and that Bakke had a private right of action available under title VI. Of the eight, four justices specifically concluded that an individual private cause of action was amply supported in the title VI legislative history and four assumed for purposes of the case that Bakke did have a private right of action. Only Justice White concluded that there was no cause of action.

124 CONG.REC. S15593 (daily ed. Sept. 20, 1978) (remarks of Senators Bayh and Cranston).

Viewed in this context, Section 505(a)(2)'s extension of the rights and remedies under Title VI to Section 504 can only be construed as additional explicit support for a private right of action.[32]

The 1978 Amendments thus confirm the Congressional intent, expressed as far back as 1974, that "Sec-

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[32] Petitioner contends that under the interpretation of Section 505(a)(2) by the court in Trageser v. Libbie Rehab. Center, No. 77-2224 (4th Cir. Dec. 18, 1978), cert. filed March 16, 1979, Mrs. Davis cannot maintain a private cause of action. However, the Trageser court specifically noted that Mrs. Davis can maintain a private action. Slip op. at 8, n. 12. The Trageser opinion dealt mainly with the scope of programs and activities covered by Section 504, not with private right of action. The court interpreted Section 505(a)(2) in the context of that issue only. To the extent that it did deal with the private right of action issue, the Trageser court confirmed the private litigant's right to sue under Section 504, provided that his/her claim falls within the scope of activities covered by the statute. As an example of a claim within the scope of the statute and hence maintainable as a private action, the Trageser court specifically cited the Fourth Circuit's opinion in Davis which "was not an employment discrimination case." Slip op. at 8, n. 12.

tion 504 . . . permit[s] a judicial remedy through a private right of action." S.REP.No. 1297, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 6391. Petitioner contends that this clear statement of legislative intent, refers only to judicial review of administrative action, especially when viewed in context. To the contrary, the Report uses the words "judicial remedy," not "judicial review." And the context of the Committee's statement supports the plain meaning of its words. The Committee Report states as follows:

> Section 504 was patterned after, and is almost identical to, the antidiscrimination language of Section 601 of the Civil Rights Act of 1964 . . . and Section 901 of the Education Amendments of 1972. . . . The language of Section 504, in following the above cited Act, further envisions the implementation of a compliance program which is similar to those Acts. . . . This approach to implementation of Section 504, which closely follows the models of the above-cited antidiscrimination provisions, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation and *permits a judicial remedy through a private action.*

Id., at 6390 (emphasis added).

The Committee's recognition of the right to a "judicial remedy through a private action" is part of a paragraph in which the parallels between Section 504 and Titles VI and IX are emphasized. The Committee Report was issued against a background of judicial approval of private litigation under Title VI. By that time, the Supreme Court and several lower courts had

allowed private suits under Title VI. See, *e.g., Lau* v. *Nichols,* 414 U.S. 563 (1974); *Bossier Parish School Board* v. *Lemon,* 370 F.2d 847 (5th Cir. 1967); *cert. denied,* 338 U.S. 911 (1967); *Hawthorne* v. *Kenbridge Recreation Assn., Inc.,* 341 F.Supp. 1382 (E.D. Va. 1972).

The fact that Congress, under these circumstances, modeled the language of Section 504 after that used in Title VI, and emphasized those parallels in its Committee Report, is persuasive evidence that it expected private suits to be permitted under Section 504.[33] The Committee Report is especially persuasive in light of the fact that it was written and adopted by the same 93d Congress that passed Section 504 the preceding year.

Despite the weight of the 1974 and 1978 Amendments and their legislative histories, Petitioner and several Amici question whether Congress intended to create a private right of action in a statute silent on its face. See Brief Amicus Curiae Equal Employment Advisory Council at 33-34; Brief of 32 States as Amici Curiae, at 36. But precisely the same statement could be made about a number of cases where this Court has implied a private right of action from a statute silent on its face. See, *e.g., Texas & Pacific Railway Co.* v. *Rigsby,* 241 U.S. 33 (1916); *J. I. Case Co.* v. *Borak,* 337 U.S. 426 (1964); and *Wyandotte Trans. Co.* v. *United States,* 389 U.S. 191 (1967). In-

[33] This Court has recognized that intervening judicial interpretation of predecessor statutes may be highly relevant in construing future legislation patterned after the earlier law. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-426 (1975); and Carolene Products Co. v. United States, 323 U.S. 18, 25-27 (1944).

deed, there would be no need to imply a private right of action if the statute were not silent on its face; this is the very purpose of the *Cort* v. *Ash* test.

In support of its argument, the Brief of 32 States as Amici, at 34, notes that "Congress has not been timid when it wishes to bestow a private right of action" in other statutes. But by the same token, Congress has not been timid when it wished to *deny* a private right of action in still other statutes. Title III of the Older American Amendments of 1975, 42 U.S.C. § 6101 *et seq.*, as originally enacted, is especially instructive. In language similar to that used in Title VI and Section 504, Title III prohibits age discrimination in federally funded programs. 42 U.S.C. § 6102. However, as originally enacted, it also contained the explicit proviso that administrative remedies shall be "the exclusive remedy for the enforcement of [Title III]." 42 U.S.C. § 6104(e). Congress thus demonstrated that it is capable of making its wishes explicit when it wants to restrict the procedures available for enforcing a statute that prohibits discrimination in federally-funded programs.[34]

[34] Section 401 of the 1978 Amendments to the Age Discrimination Act, P.L. 95-478, 92 Stat. 1555, deletes § 6104(e) and adds a new Section allowing private suits if the administrative agency has not acted within 180 days from the date of filing an administrative complaint. The Brief of American Council on Education as Amicus, at 14-15, contends that the absence of similar language in Section 504 indicates Congressional intent to deny an independent private right of action for that statute. It is quite possible, however, that Congress wished to impose no such 180-day restrictions on private suits under Section 504. Indeed, the fact that the Age Discrimination Act originally precluded all private suits indicates that Congress has always sought to restrict the private right of action under that statute. Section 504 has never contained such a proviso.

3. *A Private Right of Action is Entirely Consistent With the Underlying Purpose of Section 504.*

Section 504 also meets the third *Cort* requirement for implying a private right of action. A private remedy is consistent with and promotes the underlying purposes of Section 504. The basic purpose of Section 504 is to eliminate discrimination against handicapped persons in federally funded programs. S.REP.No. 1297, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 6388. When read together with the other sections of Title V, 29 U.S.C. § 791 *et seq.*, it is apparent that Section 504 is part of a broad civil rights act for handicapped persons, and that its provisions are to be enforced in a manner similar to other civil rights legislation.

Other Amici contend that the fact that Section 501 of the Rehabilitation Act, 29 U.S.C. § 791, as amended, contains a private action provision indicates Congressional intent to preclude such suits under Section 504. See Brief of 32 States as Amici, at 25. But as with the Age Discrimination Act, the private right of action provided in Section 501 is limited procedurally. See Section 505(a)(1) of the 1978 Rehabilitation Act Amendments, 92 Stat. 2982. It is more plausible to conclude that Congress wished to impose no such procedural limits on private suits under Section 504, especially in light of the significant differences between the administrative procedures established under Section 501 and 504. The 501 procedure is specifically designed to resolve individual complaints. See 5 C.F.R. Part 713. By contrast, the Section 504 administrative procedures and remedies are designed, not to resolve individual complaints, but to enforce the non-discrimination provisions of a contract between HEW and recipients of federal funds. See 45 C.F.R. Part 80. Hence independent judicial remedies are especially necessary to effectuate the Congresional intent of Section 504. See discussion *infra*.

In the context of other civil rights statutes, this Court has recognized that suits by persons acting as "private attorneys general" are an invaluable supplement to administrative enforcement. *Allen* v. *State Bd. of Elections,* 393 U.S. 544, 556 (1969); *Trafficante* v. *Metropolitan Life Ins. Co.,* 409 U.S. 205, 211 (1972); *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400, 401-402 (1968). In view of the large number of federally funded programs covered by Section 504, "the Act's laudable goal would be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the [federal government]. *Allen,* 393 U.S. at 556 (1969).

This reasoning persuaded the court in *Allen* to imply a private right of action under the Voting Rights Act of 1965, 42 U.S.C. § 1973, *et seq.* The Voting Rights Act, in language similar to that of Section 504, provides that no person shall be denied the right to vote on the basis of race or color. Neither the Voting Rights Act nor Section 504 explicitly authorizes private actions to enforce its provisions. Yet, the court in *Allen* implied a private right of action, notwithstanding the express statutory provision for suit by the Attorney General as a means of enforcing the Act. The Court in *Allen* recognized that if Congress' broad remedial purpose was to be realized, enforcement could not be relegated solely to the federal government. There were simply too many jurisdictions covered by the Act for the Attorney General to properly enforce the statute alone. In fact, the Attorney General, who argued in favor of a private right of action, readily conceded his office's need for help.

So, too, with Section 504, private litigation remains an indispensable tool if the goals of the statute are to be achieved. There are thousands of recipients of federal financial assistance whose actions HEW must monitor. According to Secretary Califano, there are approximately 35,000,000 handicapped persons whose rights HEW must protect. See statement of Joseph A. Califano, Secretary, HEW (April 29, 1977). In addition, the same HEW Office for Civil Rights is responsible for protecting the rights of women and minorities under Titles VI and IX. Its task is enormous. HEW needs and wants help. For that reason, HEW firmly supports a private right of action under Section 504.[35] In an affidavit relied on by the court in *Whitaker* v. *Bd. of Higher Ed. of the City of NY,* 7-C-2258 (E.D.N.Y. Oct. 17, 1978), Michael Middleton, the Director of Policy and Procedure for HEW's Office for Civil Rights, declared:

> It is important that beneficiaries of HEW-funded programs have a choice of forum for complaints of alleged discrimination. The Office for Civil Rights has a large backlog of complaints and there is presently no guarantee that any newly filed complaints can be investigated and resolved in an expeditious manner. It would be inconsistent with the Department's desire and the public's need for the speedy resolution of complaints to prohibit aggrieved parties who wish to file suit from doing so and then subject them to a lengthy period of time before acting upon their claim[s].

Whitaker, slip. op. at 20.

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[35] In Allen, this Court deemed it "significant that the United States has urged that private litigants have standing to seek declaratory and injunctive relief in these suits." 393 U.S. at 557, n. 23.

In Congressional testimony, David Tatel, Director of HEW's Office for Civil Rights, has also expressed his unqualified support for a private right of action:

> I believe it is important that the private right of action for individuals be preserved. HEW is not in a position and does not have the resources to do the whole job. Therefore, it is important that handicapped individuals have available as many avenues of resources as possible.

1977 House Oversight Hearings at 358.

Thus, private suits are vital to help federal agencies carry out their statutory obligations under Section 504. The mere threat of private suits may well prove a more significant enforcement tool than actual litigation. This Court's confirmation of the right to challenge Section 504 violations in private suits would greatly encourage voluntary compliance, which is consistent, not only with the Congressional intent to eliminate discrimination, but also with the administrative emphasis on voluntary compliance. See 45 C.F.R. Part 80.

Private suits are especially necessary to effectuate the purposes of the statute because of the limited scope of administrative relief under Section 504. As discussed in great detail *infra,* this administrative process was not designed to afford relief to individual victims of unlawful discrimination, *Whitaker,* slip. op .at 18-20; *Rios* v. *Read,* 75 Civ. 296, slip. op. at 14 (E.D.N.Y. Oct. 13, 1978); *Bakke,* 98 S.Ct. at 2814-2815.

If the only remedy available for a violation of Section 504 were a termination of funds, then Congress' anti-discrimination mandate would be an "empty promise" for the very persons who have suffered the discrimination Congress intended to prohibit. Cf. *Allen,* 393 U.S. at 557.

Under similar circumstances in which there was an obvious need for private enforcement, this Court and others have recognized a private cause of action, in addition to the administrative enforcement explicitly contemplated by the statute in question. For example, in *Rosado* v. *Wyman,* 397 U.S. 397, 420 (1970), this Court found that private plaintiffs could sue to enforce a section of the Social Security Act, despite the fact that the statute also provided HEW with the power to terminate federal funds for noncompliance. The Court held that:

> We are most reluctant to assume Congress has closed the avenue of effective judicial review of those individuals most directly affected by the administration of its program. [citations omitted]. We adhere to *King* v. *Smith,* 392 U.S. 309 (1968), which implicitly rejected the argument that the statutory provisions for HEW review of plans should be read to curtail judicial relief. . . .

397 U.S. at 420.

Other decisions also have endorsed a private right of action as a complement to an administrative enforcement scheme. See, *e.g., J.I. Case Co.* v. *Borak,* 377 U.S. 426 (1964) (private right of action to enforce SEC proxy rules); *Fitzgerald* v. *Pan American World Airways,* 229 F.2d 499, 501-502 (2d Cir. 1956) (Private right of action to enforce statute prohibiting discrimination in air transportation); *Allen.*[36]

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[36] Amici rely on National RR Passenger Corp. v. National Assn. of RR Passengers, 414 U.S. 453, 458 (1974) for their contention to the contrary. Their reliance on the Amtrak decision is mis-

Direct judicial decisions under Section 504 would pose little, if any, conflict with administrative decisions. In Congressional testimony on the compatibility of judicial and administrative enforcement, David Tatel, Director of HEW's Office for Civil Rights, stated as follows:

> On the question of the private right of action, Section 504 is Federal law, and the courts, as in Title VI and Title IX, are going to interpret it just as HEW does. I assume the Courts will use our regulations as a starting point, but my guess is that judicial decisions will help to flush out the law as we go through the next several years; but I don't see any problems of inconsistency at this point.

1977 House Oversight Hearings, at 366.

It is thus highly unlikely that direct judicial enforcement of Section 504 would interfere or conflict with

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placed. The legislative history of the statute at issue in Amtrak revealed that Congress was aware that the statute permitted private suits only in certain limited circumstances and deliberately rejected a proposal that would have expanded a private right of action. 414 U.S. at 458-461. This legislative background strongly supported the Court's conclusion that only those private suits explicitly authorized by statute should be allowed to proceed. See also T.I.M.E., Inc. v. United States, 359 U.S. 464, 471-472, 477, n. 18 (1959). No such evidence of legislative intention is present in this case. Moreover, one commentator has argued that restrictive application of the Cort test for economic regulatory statutes, such as those at issue in Amtrak and T.I.M.E., has no relevance in the context of civil rights statutes. "The cases finding private rights of action under civil rights statutes . . . indicate a consistently favorable attitude toward permitting suits under such statutes." Note, "Implied Rights of Action to Enforce Civil Rights Statutes: The Case for a Sympathetic View," 87 Yale L.J. 1378, 1388 (1978). See also "Toward Equal Rights for Handicapped Individuals: Judicial Enforcement of Section 504 of the Rehabilitation Act of 1973, 38 Ohio State L.J. 677 (1977).

agency implementation of the statute, for the courts will continue to accord great weight to agency regulations and guidelines. *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971). The Fourth Circuit's opinion in the present case is a perfect example of this judicial deference to agency interpretations.

Justice Stevens, in *Bakke,* 98 S.Ct. at 2814-2815, presented yet another compelling reason why a private right of action is totally compatible with administrative enforcement. He distinguished between a private action brought to end a particular discriminatory practice and an action brought to cut off federal funds:

> Section 601 is specifically addressed to personal rights while § 602—the fund cut-off provision—established "an elaborate mechanism for *governmental* enforcement by federal agencies." Arguably private enforcement of the "elaborate mechanism" would not fit within the Congressional scheme . . . but Bakke did not seek to cut off the University's federal funding; he sought admission to medical school. The difference between these two courses is clear and significant.

98 S.Ct. at 2814, n. 26.

The relief requested in private suits under Section 504 will rarely, if ever, include fund termination, which is the primary administrative remedy. A private plaintiff is unlikely to derive any benefit from fund termination. Mrs. Davis, like Alan Bakke, filed suit because she wanted to be admitted to nursing school, not because she wanted to block future financial aid to the College. Thus, the possibility of conflict between judicial and administrative remedies is minimal. *Rios* v. *Read,* 75 Civ. 296 (S.D.N.Y. Oct. 13, 1978); *Whitaker* v. *Bd. of Higher Educ. of City of NY,* 77-C-2258 (E.D.

N.Y. Oct. 17, 1978); *Guardians Assn. of N.Y.* v. *N.Y. City Civil Service Comm.*, 47 U.S.L.W. 2561 (S.D. N.Y. 1979).

In sum, a private right of action would not only provide an avenue for the vindication of personal rights under Section 504, but would also aid HEW and other federal agencies by serving as an additional deterrent to violations. A private remedy under Section 504 ". . . is therefore not only compatible with the legislative intent, but also is necessary to secure the Act's remedial purposes." *Davis* v. *Bucher*, 451 F.Supp. 791, 798 (E.D. Pa. 1978).

4. *The Imposition of Reasonable Anti-Discrimination Regulations on Recipients of Federally Funded Programs Is Traditionally an Area of Federal, Not State Concern.*

The fourth and final *Cort* factor is met since prohibitions against handicap discrimination in federally funded programs are surely not matters "traditionally relegated to state law, in an area basically the concern of the states." *Cort*, 422 U.S. at 78. The power exercised in Section 504 is a uniquely federal power. It is the power to control the expenditure of federal funds and to impose conditions on the way those funds may be used. Congress has often enacted, and the Court has upheld, legislation of this sort to impose reasonable regulations on recipients of federal financial assistance. See, *e.g.*, *Oklahoma* v. *United States Civil Service Commission*, 330 U.S. 127 (1947); *Lau* v. *Nichols*, 414 U.S. 563 (1974).

The right conferred by Section 504 is a uniquely federal right. It is the right to be free from discrimination in federally funded programs. Accordingly, federal courts, when called upon to vindicate the personal rights guaranteed by Section 504, have no occasion to defer to state law. Section 504 should be enforced according to a uniform federal standard, without dependence on the vagaries of state provisions concerning discrimination on the basis of handicap.[37]

B. Case law confirms the existence of an independent private right of action under Section 504

As noted earlier, a private right of action under Section 504 has been upheld by every court of appeals that has considered the issue. Most of the district courts passing on the issue have also found that a private right of action exists under Section 504.[38]

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[37] In support of their argument that handicapped discrimination is an area of state concern, the Brief of 32 States as Amici, at p. 39, points to the existence of various state laws prohibiting employment discrimination on the basis of handicap. Amici disregard the fact that many of these state statutes were enacted only *after* the passage of Section 504. See, *e.g.*, Art. 4419 (3), Tex. Civ. Stat. Ann. (1975); Va. Code Ann. § 40.1-28.7 (1976). See also Drennon v. Phila. Gen'l Hosp., 428 F.Supp. at 815, noting that employment of the handicapped has only recently been included as a goal of the Pennsylvania Human Relations Act. Many of these state remedies were inspired by Section 504; they were not intended to assert exclusive state control over handicap discrimination problems. In fact, the Virginia handicap discrimination statute, expressly excludes from the scope of its coverage, those employers already covered by Title V. Va. Code Ann. § 40.1-28.7 (1976) (emphasis added) provides as follows:

> No employer shall discriminate in employment or promotion practices against any person on account of physical handicap which is unrelated to the person's qualifications and ability to perform the job. *This section shall not apply to employers covered by the Federal Rehabilitation Act of 1973.*

[38] See Whitaker v. N.Y. Bd. of Educ., 77-C-2258 (E.D.N.Y. Oct. 19, 1978); Davis v. Bucher, 451 F.Supp. 791 (E.D. Pa. 1978); Simon v. St. Louis County, C.A. 77-114-C(4), (E.D. Mo. 1977);

Moreover, in *Campbell* v. *Kruse*, 434 U.S. 808 (1977), this Court implicitly recognized the existence of a private right of action. The Court reviewed a decision in which a three-judge federal district court resolved a private suit on constitutional grounds without ruling on the appellee's claim under Section 504. The Court vacated the judgment below and remanded ". . . with directions to decide the claim based on the federal statute, § 504 of the Rehabilitation Act of 1973. . . ." 434 U.S. at 808.

Again in *Bakke*, 98 S.Ct. at 2814-2815, four members of this Court recognized the existence of a private right of action under Section 504, while four others assumed its existence for purposes of that case. In finding a private right of action under Title VI, Justice Stevens' opinion specifically cited Section 504 as an example of legislation which "Congress has repeatedly enacted . . . predicated on the assumption that Title VI may be enforced in a private action." 98 S.Ct. at 2814-2815, n. 27.[39]

Vanko v. Finley, 440 F.Supp. 656 (N.D. Ohio 1977); Jayne v. Univ. of Nevada, Reno, Civ. No. R-76-183 BRT (D. Nev. June 10, 1977); Mich. Paralyzed Vets of America v. Coleman, C.A. 5-71114 (E.D. Mich. Nov. 3, 1977); Halderman v. Pennhurst State School and Hospital, 446 F.Supp. 1295 (E.D. Pa. 1977); NY State Assn. for Retarded Children, Inc. v. Carey, 72-C-356 (E.D.N.Y. Sept. 14, 1978).

[39] Justice Stevens also noted that, "to date, the Courts, including this Court, have unanimously concluded or assumed that a private right of action may be maintained under Title VI." 98 S.Ct. at 2814-2815. He concluded that Title VI met all four of the Cort requirements for implying a private right of action. 98 S.Ct. at 2815, n. 28. This analysis with respect to Title VI applies equally to Section 504, in light of Section 505(b)(2) of the Rehabilitation Amendments of 1978. See discussion *supra*.

Justice Stevens also cited with approval the Seventh Circuit's analysis of Section 504 in *Lloyd* v. *Regional Transp.Auth.*, 548 F.2d 1277 (7th Cir. 1977). Yet the College contends that the *Lloyd* analysis needs reconsideration because of its misplaced reliance on *Lau* v. *Nichols* for the principle that Title VI creates a private right of action.[40] Petitioner's Brief at 58. While it is true that *Lau* only implicitly recognized a private right of action under Title VI, the Court did hear arguments on the issue. See Respondent's Brief in Opposition to Petition for Certiorari, at 7. And the Court expressly decided the private Title VI claim on its merits and refused to reach Petitioners' Equal Protection claims. *Lau* thus acknowledged the legitimacy of private suits under Title VI.

Finally, those who would question the *Lloyd* decision because of its reliance on *Lau* forget that *Lloyd* relied alternatively on the *Cort* v. *Ash* test for implying a private right of action. Its decision was not based solely on *Lau*. The *Lloyd* court engaged in an extensive analysis of the *Cort* v. *Ash* factors, an analysis which four members of this Court cited with approval in *Bakke*, 98 S.Ct. at 2814-2815.

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[40] Petitioner ignores the many decisions, in addition to Lau, which "have unanimously concluded or assumed that a private right of action may be maintained under Title VI." Bakke, 98 S.Ct. at 2814-2815. Petitioner also attacks the Lloyd Court's reliance on Lau by noting that the same Seventh Circuit that decided Lloyd rejected the notion that Lau supports a private right of action under Title IX in Cannon v. Univ. of Chicago, 559 F.2d 1063 (7th Cir. 1977). From this, Petitioner erroneously concludes that the Seventh Circuit has repudiated that portion of its Lloyd opinion that relied upon Lau. Petitioner's Brief at 59. However, the Seventh Circuit decided Lloyd *after* its first opinion in Cannon which rejected the applicability of Lau to Title IX. The Lloyd Court specifically stated that it did not view Cannon as controlling. 548 F.2d at 1287.

IV. The Doctrines of Administrative Exhaustion and Primary Jurisdiction Do Not Apply to Present Case

A. The issues of administrative exhaustion and primary jurisdiction are not properly before this Court.

Petitioner erroneously contends that if a private right of action is found, the Court must consider the issues of exhaustion of HEW administrative remedies and primary jurisdiction. Neither the district court nor the court of appeals considered these issues. Indeed neither court ever determined whether administrative remedies even exist. The Fourth Circuit thus properly remanded to the District Court with instructions to consider these legal issues, if it demed advisable.[41]

Clearly, then these issues, like the issue of affirmative relief discussed *supra,* are new matters which cannot be raised in this Court. *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971); *United States* v. *Estate of Donnelly,* 397 U.S. 286 (1970); *Adickes* v. *Kress and Co.,* 398 U.S. 144 (1970); *Tennessee* v. *Dunlap,* 426 U.S. 312 (1976).

B. Frances Davis need not exhaust this inadequate and ineffective HEW administrative remedy

Assuming *arguendo* that the issue of administrative exhaustion is properly before the Court, that doctrine should not prevent Frances Davis from bringing a private cause of action.

"It is well settled that administrative remedies need not be sought if they are inherently inadequate or are

[41] The Brief of Equal Employment Advisory Council, as Amicus in Support of Petitioner, at p. 37, concedes this point.

applied in such a manner as in effect to deny the petitioners their rights." *McCoy* v. *Greensboro City Bd. of Education,* 283 F.2d 667, 670 (4th Cir. 1960). See also *Smith* v. *Ill. Bell Tel. Co.,* 270 U.S. 587, 591-592 (1926); *Walker* v. *Southern Ry. Co.,* 385 U.S. 196 (1966); *K. Davis, Administrative Law Treatise* §§ 20.01, 20.07 (1958).

Applying this principle to the present case, exhaustion is not required because the HEW administrative remedy is inadequate in the following respects:

1. At the time Mrs. Davis filed the suit, there was no HEW administrative procedure available for her to exhaust;

2. HEW's administrative procedures are not designed to vindicate the individual rights protected by Section 504; and

3. HEW's excessive and undue administrative delay in investigating complaints may render that remedy entirely meaningless and ineffective for Mrs. Davis.

As discussed in greater detail *infra,* exhaustion is never required under any of these circumstances.

1. *There Was No Administrative Procedure Available for Mrs. Davis to Exhaust When She Filed Suit.*

At the time Mrs. Davis filed this suit, the HEW Regulation creating an administrative procedure had not yet been issued. Accordingly, there was no administrative procedure available for her to exhaust. Under such circumstances, the exhaustion doctrine obviously does not apply. *Bossier Parish School Bd.* v. *Lemon,* 370 F.2d 847 (5th Cir. 1967), *cert. denied,* 338 U.S. 911 (1967); *Deering Milliken, Inc.* v. *Johnston,* 295 F.2d

856 (4th Cir. 1961); *Lloyd* v. *Regional Transp. Auth.*, 548 F.2d at 1286.

Petitioner contends that the *Lloyd* case permitted a private right of action "only because no administrative enforcement procedures had at that time been established." [42] Petitioner's Brief at 63. But even under this narrow interpretation of *Lloyd* and the scope of a private right of action, the exhaustion doctrine does not apply to the facts of the present case. As in *Lloyd,* the HEW Regulation was not in effect at the time Mrs. Davis filed suit. There was no administrative procedure available for her to exhaust. Like the Plaintiff in

[42] Petitioner's argument ignores the fact that many cases, including this Court's decision in Campbell v. Kruse, 434 U.S. 808 (1977), recognized a private right of action under Section 504 even after administrative procedures had been established. See also Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977); Whitaker v. Bd. of Higher Educ. of City of NY, slip op. at 18; Davis v. Bucher, 451 F.Supp. 791 (E.D. Pa. 1978); Mich. Paralyzed Vets of America v. Coleman, CA. 5-7114 (E.D. Mich. Nov. 3, 1977); Simon v. St. Louis County, Mo., CA. 77-114-C(4) (E.D. Mo. Jan. 31, 1978). None of these courts saw fit to depart from the result in Lloyd simply because the anticipated administrative enforcement scheme had taken effect. Petitioner also contends that the HEW Regulation constitutes the "meaningful administrative enforcement mechanism" referred to by the Lloyd court, 548 F.2d at p. 1286, n. 29. See Petitioner's Brief at 64. But, for the reasons listed *supra,* the HEW procedures are not a "meaningful administrative enforcement mechanism" for Frances Davis. See also *Whitaker,* slip op. at 18-20; Rios v. Read, slip op. at 14. But see *contra,* Doe v. New York University, 442 F.Supp. at 522, 1978. While the court in Doe found the Section 504 administrative remedies effective "on paper," the court went on to say that "if HEW does not or cannot provide an effective remedy, a decision to bypass the administrative machinery would rest on a substantial ground." 442 F.Supp. at 524. Thus it is obvious that any inadequacies in the HEW administrative remedies were not fully considered by the court in Doe.

Lloyd, Mrs. Davis had no choice but to seek judicial relief if she hoped to vindicate her statutory rights.[43] "When administrative remedial machinery does not exist to vindicate an affirmative right, there can be no objection to an independent cause of action in the federal courts." *Lloyd,* 548 F.2d at 1286.

2. *The HEW Administrative Remedy Cannot Vindicate the Personal Rights of Mrs. Davis*

Justice Stevens, speaking for four Justices of this Court in *Bakke,* 98 S.Ct. at 2814-2815, found that Title VI "involves personal federal rights that administrative procedures would not, for the most part, be able to protect." Accordingly, Justice Stevens concluded that Alan Bakke should be allowed to totally bypass the Title VI administrative enforcement procedures.[44] See also *Guardians Assn. of NY* v. *NY City Civil Service Comm'n.,* 47 U.S.L.W. 2561 (S.D.N.Y. 1979); *Whitaker* v. *Bd. of Higher Educ. of City of NY,* 77-C-2258 (E.D.N.Y. October 17, 1978); *Rios* v. *Read,* 75 Civ. 296 (S.D.N.Y. Oct. 13, 1978).

The enforcement procedures under Section 504 are the same as Title VI procedures which were found

[43] The Amicus Brief of the Equal Employment Advisory Council, at p. 37, concedes this point.

[44] The Brief of 32 States as Amici, at 53, cites several cases in support of their contention that one cannot bypass Title VI administrative remedies. See Green St. Assn. v. Daley, 373 F.2d 1 (7th Cir. 1967); Johnson v. Chester County, 413 F.Supp. 1299 (E.D. Pa. 1976); Dupree v. Chatanooga, 362 F.Supp. 1136 (E.D. Tenn. 1973). But each of the cases cited involved suits by private litigants seeking fund termination, not personal redress. As Justice Stevens noted in Bakke, "the difference between these two courses is clear and significant." 98 S.Ct. at 2814, n. 26. See discussion, *supra.*

incapable of vindicating personal rights in *Bakke*. See 45 C.F.R. § 84.61. For the very same reasons, Frances Davis should be allowed to bypass this administrative mechanism.

In *Whitaker,* slip op. at 18-20, the Court held that the HEW administrative process, "by its very terms," is not designed as an individual complaint procedure. Instead, it is designed to monitor and enforce the non-discrimination provisions of a contract between HEW and recipients of federal financial assistance. The HEW Regulation focuses on the rights of these two parties, not the individual complainant.

The Regulation only requires HEW to investigate an individual complaint; it need not resolve the matter on the individual's behalf. 45 C.F.R. § 80.7(c). In fact, HEW can totally ignore the individual victim of past discrimination in its efforts to secure voluntary compliance. See Todd, "Title IX of the 1972 Education Amendments. Preventing Sex Discrimination in Public Schools," 53 Texas L.Rev. 103, 120 (1974).

If voluntary compliance efforts fail, an administrative hearing is held. 45 C.F.R. § 80.8. The purpose of the hearing is to provide HEW with a forum to initiate fund termination proceedings. 45 C.F.R. § 80.8(c). The hearing is not intended to provide, nor has it operated as, a forum for individual complainants to obtain individual relief. The individual complainant does not become a party to any of the proceedings. 45 C.F.R. § 81.23.

Both HEW and the recipient have the right to be represented by counsel and to present relevant evidence. 45 C.F.R. § 80.9(c) and (d). The individual

complainant, however, has no such rights. "Indeed, the only relationship he may have with these proceedings is the receipt of a notice that an administrative hearing is going to be held." *Whitaker,* slip op. at 19.

Moreover, as noted earlier, the remedy resulting from the administrative hearing—fund termination—"is not designed to give the type of relief available in the District Court." *Rios* v. *Read,* slip op. at 14. See also *Guardians,* 47 U.S.L.W. at 2561; Note, "Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View," 87 Yale L.J. 1378, 1406 (1978). "In short while the administrative process may effectively provide, by way of the threat of fund termination, an incentive to comply with Section 504, it provides no means by which an individual can obtain personal redress for a Section 504 violation." *Whitaker,* slip op. at 20. See also, *Rosado* v. *Wyman,* 397 U.S. 397 (1970).

Because HEW's administrative procedure could not vindicate her personal rights, Frances Davis turned to the federal courts as her only viable alternative. "The more clearly it is established that alternative remedies fail in theory and practice, the stronger the case for implying private actions." L.A. Albert, "Standing to Challenge Administrative Action: An Inadequate Claim for Surrogate for Relief," 83 Yale L.J. 425, 454 (1974).

3. *Excessive and Undue Administrative Delay May Render HEW's Administrative Remedy Inadequate and Ineffective in this Case*

It is well-established that excessive and undue administrative delay in enforcement may render an administrative remedy so inadequate as to totally excuse

exhaustion. *Walker* v. *So. Ry. Co.*, 385 U.S. 749 (1966); *Smith* v. *Ill. Bell Tel. Co.*, 270 U.S. 587 (1926).

The heavy backlog of race, sex and handicap complaints at HEW's Office for Civil Rights has persuaded two courts to conclude recently that Section 504 "exhaustion procedures are meaningless." *Camenisch* v. *University of Texas*, No. A-78-CA-061, slip op. at 3 (W.D. Tx. May 17, 1978); *Whitaker*, slip op. at 20.

"HEW itself . . . had represented to the Court that there is a large backlog of [Section 504] complaints and there is no guarantee that any newly filed complaint can be investigated and resolved in an expeditious manner. Accordingly . . . there clearly is still no effective administrative enforcement mechanism." *Whitaker*, slip op. at 20. See also Testimony of David Tatel in 1977 House Oversight Hearings at 358.

In the present case, no evidence has been taken on whether HEW's delay in enforcing Section 504 complaints has rendered that administrative remedy inadequate for Mrs. Davis. Accordingly, the Fourth Circuit properly remanded for consideration of whether Mrs. Davis should be required to exhaust.

C. The doctrine of primary jurisdiction does not apply to the present case

The doctrine of primary jurisdiction does not apply to the present case because of the same administrative inadequacies which entitle Mrs. Davis to bypass exhaustion. As the court in *Lloyd* stated, "There being no administrative remedy open to these plaintiffs, neither the exhaustion *nor primary jurisdiction* doctrine applies." 548 F.2d at 1287, cited with approval in *Whitaker*, slip op. at 20 (emphasis added).

Moreover, the basic rationale for asserting primary jurisdiction simply has no relevance to the present case. Classically, the primary jurisdiction doctrine is reserved for situations in which there is no ascertainable standard for a court to enforce and determination of that standard has been delegated to an administrative body assumed to have special expertise in the area. See, *e.g.*, *Texas and Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 423 (1975). Or the doctrine is reserved for situations in which "issues of fact not within the conventional experience of judges [are raised]," or where the statutes call for ". . . the exercise of administrative discretion." *Far East Conference* v. *United States*, 342 U.S. 570, 574 (1952).

None of these situations exists in the present case. There is no problem with finding a standard for the Court to enforce; HEW has issued detailed regulations implementing Section 504. Courts are highly experienced in and well suited to the tasks of adjudicating discrimination complaints and interpreting regulations. The numerous Section 504 cases already decided by the courts indicate that the courts do, in fact, have the requisite expertise to adjudicate such claims. In the words of Judge Friendly, "[I]t is hard to conceive a task more appropriate for federal courts than to protect civil rights. . . ." H. Friendly, *Federal Jurisdiction: A General View*, 90 (1973). Accordingly, there is no need to allow HEW to take primary jurisdiction in this case.

CONCLUSION

For these various reasons, the judgment of the Fourth Circuit should be affirmed.

Respectfully submitted,

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March 31, 1979

APPENDIX

Employment of Handicapped Individuals Including Disabled Veterans in the Federal Government

Report Prepared for:

Senate Committee on Human Resources

Senate Committee on Veterans' Affairs

House Committee on Education and Labor

House Committee on Veterans' Affairs

September 30, 1978

U.S. Civil Service Commission

OCCUPATIONS MOST FREQUENTLY HELD BY HANDICAPPED FEIERAL EMPLOYEES

APPENDIX F

	OCCUPATIONAL SERIES NUMBER	TOTAL NO. HANDICAPPED	HEARING IMPAIRMENTS		
			HEARING IMPAIRED TOTAL	DEAF	HARD OF HEARING
General Crl. & Admin.	301	9,567	871	104	767
Nursing Asst.	621	4,665	302	4	298
Supply Clerical	2,005	3,083	280	28	252
Clerk Typist	322	2,908	346	66	280
Nurse	610	2,670	156	1	155
Secretary	318	2,639	194	0	194
Mail & File	305	2,215	239	79	160
Engin. Tech	802	2,174	264	11	253
Computer Spec.	334	1,904	194	26	168
Electronics Tech.	856	1,533	178	4	174
Accounting	510	1 454	156	24	132
Contract Procuremen+	1,102	1,372	108	1	107
Medical Officer	602	1,348	86	1	85
Contact Repres.	962	1,331	78	1	77
Tax Accounting	592	1,185	111	24	87

DATA SOURCE: CENTRAL PERSONNEL DATA FILE